82-996

No.

Office - Supreme Court, U.S.
FILED
DEC 14 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE RENT-IT CORPORATION,

Petitioner

v.

WILLIAM CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

J. SAMUEL CHOATE, JR.
505 First National Bank Building
801 Broad Street
Augusta, Georgia 30903
(404) 722-3301

Attorney for Petitioner and Counsel of Record

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTION PRESENTED

1. Whether the consumer lease transaction entered into between the parties, which is terminable at will by the lessee and includes an option to own, constitutes a "credit sale" under the Truth-In-Lending Act, 15 U.S.C. § 1601 *et seq.*, within the meaning of § 1602(g) of that Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 17

APPENDICES:

A: Opinion of the United States Court of Appeals for the Eighth Circuit, *Clark v. Rent-It Corp.*, dated 8/13/82 ..... 1a

B: Opinion of the United States District Court for the Southern District of Iowa, *Clark v. Rent-It Corp.*, dated 4/24/81 ..... 9a

C: Order of the United States Court of Appeals for the Eighth Circuit denying motion for rehearing, *Clark v. Rent-It Corp.*, dated 9/15/82 ..... 15a

D: Order of the United States Court of Appeals for the Eighth Circuit denying motion to recall and stay mandate, *Clark v. Rent-It Corp.*, dated 10/12/82 ..... 16a

E: Rental Agreement entered into between William Clark and The Rent-It Corporation, dated 2/1/80 ..... 17a

F: Petition for Rehearing in United States Court of Appeals for the Eighth Circuit, *Clark v. Rent-It Corp.*, dated 9/3/82 ..... 21a

TABLE OF AUTHORITIES

Cases: Page

Bowles v. Seminole Rock Co., 325 U.S. 410, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945) 11

Clark v. Rent-It Corp., 511 F. Supp. 796 (1981) 2, 13

Clark v. Rent-It Corp., 685 F.2d 245 (1982) 1, 7, 15

Davis v. Colonial Securities Corp., 541 F. Supp. 302 (1982) 13, 14, 15

Dodson v. REMCO Enterprises, Inc., 504 F. Supp. 540 (1980) 12

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) . . . . . *passim*

Lemay v. Stromans, Inc., 510 F. Supp. 921 (1981) 12

Mourning v. Family Publications Service, 411 U.S. 356, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973) 11

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 77 L. Ed. 796, 53 S. Ct. 350 (1933) 11

Power Reactor Co. v. Electricians, 367 U.S. 396, 6 L. Ed. 2d 924, 81 S. Ct. 1529 (1961) 11

Smith v. ABC Rental Systems of New Orleans, Inc., 491 F. Supp. 127 (1978) 12

Smith v. ABC Rental Systems of New Orleans, Inc., 618 F.2d 397 (1978) 13

Stewart v. REMCO Enterprises, Inc., 487 F. Supp. 361 (1980) 12

Udall v. Tallman, 380 U.S. 1, 43 L. Ed. 2d 616, 85 S. Ct. 792 (1965) 11

United Mine Workers v. Gibbs, 383 U.S. 555 (1980) 6

Waldron v. Best T.V. & Stereo Rentals, Inc., 485 F. Supp. 718 (1979) 13

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) 11

Statutes and Regulations:

Page

Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, 15 U.S.C. § 1601 *et seq.*:

Section 1601 *et seq.* 3, 6

Section 1602(g) 2, 6, 8

Section 1604(a) 3, 4, 9

Section 1640(e) 6

Section 1640(f) 10

Consumer Leasing Act of 1976, Pub. L. 94-240, 90 Stat. 257, 15 U.S.C. § 1667 *et seq.*:

Section 1667 . . . . . 2, 4, 8, 13

Title 28, "Judiciary and Judicial Procedure," U.S.C. § 1 *et seq.*:

Section 1254(1) 2

Section 1337 6

Truth-In-Lending Regulations (Regulation Z), 12 C.F.R. § 226.1 *et seq.*:

Section 226.1(16) 9, 10, 13, 14

Miscellaneous:

Federal Reserve Board Staff Opinions:

No. 701, July 31, 1973 9

No. 750, January 11, 1974 9

No. 761, March 12, 1974 9

No. 783, April 1, 1974 9

No. 871, February 28, 1975 9

No. 1010, February 25, 1976 9

No. 1192, June 15, 1977 9

No. 1259, October 20, 1977 9

H.R. Report No. 1040, 90th Cong., 2d Sess. (1968) 4

S. Report No. 94-590, 94th Cong., 1st Sess. 4 (1976) 4

Iowa Consumer Credit Code, Chapter 537, Code of Iowa 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE RENT-IT CORPORATION,

Petitioner

v.

WILLIAM CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

J. Samuel Choate, Jr., on behalf of the Rent-It Corporation, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-8a) is reported at 685 F.2d 245 (1982). The opinion

of the District Court (App. B, *infra*, 9a-12a) is reported at 511 F. Supp. 796 (S.D. Ia. 1981).

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, 1a-8a) was entered on August 12, 1982. A Petition for Rehearing was denied on September 15, 1982 (App. C, *infra*, 15a). A Motion for Stay of Mandate was denied on October 12, 1982 (App. D, *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 103(g) of the Consumer Credit Protection Act, Pub. L. 96-321, 82 Stat. 146, codified at 15 U.S.C. § 1602, provides:

> (g) The term "credit sale" refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and if it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

2. Section 3 of the Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257, codified at 15 U.S.C. § 1667 *et seq.*, provides in relevant part:

> (1) The consumer lease is defined as a contract for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family or house-

hold purposes. The definition specifically excludes a lease for agricultural, business or commercial purposes or to a governmental agency.

3. Section 105 of the Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146, codified at 15 U.S.C. § 1604, provides in relevant part:

> (a) The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

STATEMENT OF THE CASE

1. In 1968 Congress enacted the first Truth-In-Lending legislation as Title I of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968); subsequent acts and amendments have been codified at 15 U.S.C. § 1601 *et seq.*, and are known generally as the Federal Truth-In-Lending Act. The legislation was enacted to enable consumers to compare more readily the various credit terms available to them and to avoid the uninformed use of credit. The thrust of the Act was disclosure of credit terms, of finance charges, and of the rights and liabilities in consumer transactions. Among the various types of consumer transactions contemplated by the Act, and subject to disclosure, are credit sales. Furthermore, the definition of a "credit sale" was made broad enough to include certain lease arrangements which were merely disguised sales. However, Congress was aware of the distinction

between true leases and disguised credit sales, and the definition of "credit sale" was intended to reflect that fact. H. R. Report No. 1040, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Ad. News 1960, 1980.

As originally enacted, the Truth-In-Lending Act had no application to leases (unless they amounted to disguised credit sales). But in 1976 Congress enacted the Consumer Leasing Act, P.L. 94-240, 90 Stat. 257, which provided for disclosures similar to those required with credit sales. However, the scope of the 1976 act was limited to consumer leases of more than four months' duration. As indicated in the legislative history of that act, the new act would not "apply to a shorter term convenience-type lease arrangement where the lessee is not obligated *at the outset* to a term of more than four months." S. Rep. No. 94-590, 94th Cong., 1st Sess. 4, reprinted in 1976 U.S. Code Cong. & Ad. News, 431, 434.

Therefore, neither the initial Truth-In-Lending Act nor the Consumer Leasing Act of 1976, nor any subsequent amendments to either, include within the scope of their provisions a consumer lease of less than four months' duration and which is terminable by the consumer at will.

In enacting the Truth-In-Lending legislation, Congress delegated to the Federal Reserve Board the responsibility for promulgating rules and regulations concerning the act. 15 U.S.C. § 1604. The Board was given the authority to interpret the provisions of the act in order that any questions regarding the act could be handled administratively rather than through litigation. The Supreme Court has held that the Board's interpretation of the act is entitled to substantial deference, and that the Board's interpretation of a particular provision of the TILA

should be "dispositive" in a case involving such provision. A court may not substitute its judgment for that of the Board, unless, as a condition precedent, that court examines the Board's position and finds the same to be "demonstrably irrational." A court's failure to satisfy this condition precedent to substituting its interpretation for that of the Board is reversible error. *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

2. On or about October 13, 1979, the Respondent, William Clark, entered into a contract with the Petitioner, The Rent-It Corporation, for the rental of a television set. The terms of the contract (App. E, *infra*, 17a-20a) provided that Respondent would be entitled to full use and possession of the television for one week for a rental fee of seventeen ($17) dollars; thereafter, the renter was given the right to renew the lease for successive rental periods by paying the seventeen ($17) dollar rental fee in advance each week. The conract provided that Rent-It Corporation would be obligated, at its expense, to maintain the television in good working order at all times. Additionally, the contract provided that the renter would be entitled to ownership of the television if he rented the set for seventy-eight consecutive rental periods. However, the contract also gave the renter the right to unilaterally terminate the lease at any time, without further obligation and without penalty.

After making payments for a number of weeks, the Respondent failed to make a weekly payment; the Petitioner exercised its right under the contract to terminate the contract and take possession of the television set. On or about February 1, 1980, Respondent entered into a second agreement with the Petitioner substantially similar to the agreement dated October 13, 1979. Under the terms of this new contract, the Re-

spondent made payments for the use of the television set for several months, but once again failed to make payments as required under the contract; and, on or about the 5th day of August, 1980, the Petitioner took possession of the television set once again. At this point the contract was, of course, terminated and the relationship between the parties was at an end. Thereafter, Respondent brought this action in the United States District Court for the Southern District of Iowa. The federal court's jurisdiction was invoked pursuant to § 130(e) of the Consumer Credit Protection Act, 15 U.S.C. § 1640(e), and 28 U.S.C. § 1337.

In its Complaint, the Respondent alleged violations on the part of The Rent-It Corporation of the Truth-In-Lending Act, 15 U.S.C. §§ 1601 *et seq.*, for its failure to make certain disclosures required by that act; in particular, Respondent alleged that "this agreement, although in the form of a lease, constituted a credit sale, within the meaning of the Truth-In-Lending Act, 15 U.S.C. § 1602(g)." In addition, the Respondent alleged certain violations of the Iowa Consumer Credit Code, Chap. 537, Code of Iowa. The Respondent brought these state claims in the District Court on the basis of that court's pendent jurisdiction.

On motion by the Defendant, The Rent-It Corporation, the United States District Court dismissed the complaint for failure to state a claim under the Truth-In-Lending Act and the Court further dismissed the pendent state claims, citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

On appeal to the Eighth Circuit Court of Appeals, the District Court was reversed; the Eighth Circuit held that the District Court's analysis of the Truth-In-Lending Act was unduly restrictive, and that the Plaintiff

should have been allowed to introduce evidence of the "totality of the circumstances surrounding [the] transaction" and the parties' "contractual expectations." 685 F.2d 245, 247 (1982).

The Petitioner, The Rent-It Corporation, filed a Petition for Rehearing in the Eighth Circuit on September 5, 1982. That petition (App. F, *infra*, 21a-29a) pointed out to the Eighth Circuit, *inter alia*, that its decision was in conflict with the Federal Reserve Board's interpretation of the act, that the court had not found the Board's interpretation to be "demonstrably irrational," and that, therefore, the Eighth Circuit was ignoring this Court's directive in *Milhollin* that the Board's interpretation of the TILA be followed. The petition for rehearing was denied on September 15, 1982.

REASONS FOR GRANTING THE PETITION

This case presents an issue which is being heavily litigated in the federal and state courts around the country, and the Petitioner respectfully submits that there are three reasons why this Court should grant a Writ of Certiorari in this case:

(1) The Eighth Circuit's interpretation of the term "credit sale" as defined by the Truth-In-Lending Act, is in direct and irreconcilable conflict with the Federal Reserve Board's interpretation; further, the Eighth Circuit did not find that the Board's interpretation was "demonstrably irrational." The Eighth Circuit thus totally ignored the Supreme Court's admonition in *Milhollin* that the Board's interpretation of the Act be dispositive in such cases. (2) There is a growing tendency among courts to disregard the authority of the Federal Reserve Board in its interpretation of the Truth-In-Lending Act in spite of the Supreme Court's directive

in *Milhollin* that the Board's interpretation be followed. (3) The Eighth Circuit has violated well-known principles of contract law by seeking to examine the subjective intent of the parties rather than the unambiguous and objective manifestations in the written agreement.

As stated by the Court of Appeals, the sole issue[1] in this case is whether the rental agreement with "option to purchase" executed by Clark and the Rent-It Corporation constituted a "credit sale" under the Truth-In-Lending Act within the meaning of 15 U.S.C. § 1602(g). As noted above, the rental agreement granted the lessee the unrestricted right to terminate the lease at any time, without further obligation and without penalty. This type of lease is known in the rental industry as a "terminable consumer lease."

In enacting the Truth-In-Lending Act, Congress was aware that because of the complexity and variety of consumer transactions, no single statute could provide the needed regulation in the area; Congress therefore delegated substantial authority to the Federal Reserve Board for the promulgation of rules and regulations under that act:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter,

---

[1] The applicability of the Consumer Leasing Act of 1976, 15 U.S.C. § 1667 *et seq.*, was not an issue raised by the Plaintiff below. In point of fact, the lease contract at issue here is not covered by the 1976 Act, which covers only leases exceeding four months in duration.

> to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604(a).

Charged with the responsibility of interpreting the Truth-In-Lending Act, the Federal Reserve Board has issued a comprehensive set of regulations for the enforcement of that act, *i.e.*, Regulation Z, 12 C.F.R. § 226 *et seq.* Until recently, that regulation defined a "credit sale" in terms identical to the act itself; by simply restating the definition, the Board failed to clarify the arguably imprecise language of the act. However, in a number of written opinions, the Federal Reserve Board has uniformly and consistently held that terminable consumer leases do not constitute credit sales within the meaning of the Truth-In-Lending Act. *See* Federal Reserve Board Staff Opinions No. 701, July 31, 1973; No. 750, January 11, 1974; No. 761, March 12, 1974; No. 783, April 1, 1974, 5 CCH, CCG ¶ 31,105; No. 871, February 28, 1975, 5 CCH, CCG ¶ 31,202; No. 1010, February 25, 1976, 5 CCH, CCG ¶ 31,350; No. 1192, June 15, 1977, 5 CCH, CCG ¶ 31,623; and No. 1259, October 20, 1977.

The Board's interpretation of the term "credit sale" as applied to terminable consumer leases has focused on the requirement that the consumers have "contracted to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property or services involved." The Board noted that this requirement is not met when "the lease agreement may be cancelled at any time . . . , at no cost or penalty to the consumer." FRB Op. No. 750, January 11, 1974. The Board thus found that this right to terminate the lease on the part of the lessee, put such transactions beyond the scope of the Truth-In-Lending Act.

The Federal Reserve Board's treatment of these terminable consumer leases has been unwavering in its consistency. The Board holds that these terminable leases are not covered by the Truth-In-Lending Act (see FRB opinions cited above). This fact has been made absolutely clear by the latest version of Regulation Z, which came into effect on April 1, 1981, and became mandatory as of October 1, 1982. That regulation now defines a credit sale as follows:

> (16) "Credit sale" means a sale in which the seller is a creditor. The term includes a bailment or lease (*unless terminable without penalty at any time by the consumer*) under which the consumer: (i) agrees to pay as compensation for use, a sum substantially equivalent to or in excess of, the total value of the property and services involved; and (ii) will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

12 C.F.R. § 226.2(16) (emphasis added).

The only change in the definition is the parenthetical exclusion of terminable consumer leases. This latest definition of a credit sale under Regulation Z would have been *dispositive* of this case had it been in effect on the date that the parties in this case entered into the transaction. Even so, this revised definition of a "credit sale" does *not* represent a departure from the earlier position of the Federal Reserve Board. The Board has held consistently and uniformly that terminable consumer leases are not covered by the Truth-In-Lending Act; and, the Petitioner had a right to rely on those interpretations by the Board. 15 U.S.C. § 1640(f). This latest version of Regulation Z merely confirms what the Board had stated many times before.

In light of the Board's clear position on the inapplicability of the Truth-In-Lending Act to terminable consumer leases, the only question that remains is whether the Eighth Circuit was obliged to accept the Board's interpretation. The answer was given by this Court in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

In *Milhollin* this Court explicitly upheld the Board's authority to interpret the Truth-In-Lending Act. Furthermore, this Court unambiguously articulated the weight to be given the opinions of the staff of the Federal Reserve Board by courts construing the TILA:

> *Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons.*
>
> The Court has often repeated the general proposition that considerable respect is due " 'the interpretation given [a] statute by the officer or agency charged with its administration.' " *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 57 L. Ed. 2d 337, 98 S. Ct. 2441 (1978), quoting *Udall v. Tallman*, 380 U.S. 1, 16, 43 L. Ed. 2d 616, 85 S. Ct. 792 (1965); see, e.g., *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, 6 L. Ed. 2d 924, 81 S. Ct. 1529 (1961). An agency's construction of its own regulations has been regarded as especially due that respect. See *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945). This traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in "setting [the statutory] machinery in motion . . . ." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 77 L. Ed. 796, 53 S. Ct. 350 (1933). As we emphasized in *Mourning v. Family Publications Service*,

> 411 U.S. 356, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973), Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder.
>
> Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. *Id.* at 565, 566.

(Emphasis supplied.)

It is difficult to imagine a more direct statement to the courts, but somehow the Eighth Circuit failed to get the message.

The *Milhollin* decision makes clear that the Eighth Circuit was obliged to follow the Board's interpretation of the meaning of the term "credit sale," unless, as a condition precedent to holding otherwise, the Court found the Board's position to be "demonstrably irrational."

The Eighth Circuit did not find the Board's interpretation to be "demonstrably irrational." By failing to even *consider* the Board's position, and by substituting its judgment for that of the Board, the Court of Appeals committed reversible error.

The Eighth Circuit's holding in the case at bar not only ignores the clear authority of the Federal Reserve Board, it conflicts with the majority of District Court cases holding that terminable consumer leases do not constitute "credit sales." *Stewart v. REMCO Enterprises, Inc.*, 487 F. Supp. 361 (1980); *Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127 (1978); *Lemay v. Stromans, Inc.*, 510 F. Supp. 921 (1981); *Dodson v. REMCO Enterprises, Inc.*, 504 F. Supp. 540 (1980); and

Clark v. Rent-It Corporation, 511 F. Supp. 796 (1981); *contra, Waldron v. Best T.V. & Stereo Rentals, Inc.*, 485 F. Supp. 718 (1979); and, *Davis v. Colonial Securities Corp.*, 541 F. Supp. 302 (1982). Only two circuit courts have dealt with the issue, one of which was the Eighth Circuit in the case at bar. The other was *Smith v. ABC Rental Systems of New Orleans, Inc.*, 618 F.2d 397 (5th Cir. 1978), which issued a per curiam opinion as follows:

> The District Court correctly held that the transaction which forms the basis of Plaintiff-Appellant's claim in this action was not covered by the Consumer Leasing Act of 1976 (15 U.S.C. § 1667) and § 226.15 of Regulation Z (12 C.F.R. § 226.15), or the Truth-In-Lending Act (15 U.S.C. § 1601 et seq.) and § 226.8 of Regulation Z (12 C.F.R. § 226.8). The Judgment appealed from is AFFIRMED.

The Eighth Circuit preferred to rely on the authority of *Waldron v. Best T.V. & Stereo Rentals, Inc.*, 485 F. Supp. 718 (D. Md. 1979). In *Waldron, supra,* the Court likewise made no reference to the Federal Reserve Board's interpretation of the Act, but simply stated that "despite the presence of the termination clauses, the agreement was essentially a contract for the credit sale of the TV set to Plaintiff." *Id.* at 719. The failure of the District Court in *Waldron* to follow the interpretations of the Federal Reserve Board was explainable in part because that decision was rendered before the Supreme Court decided *Milhollin.*

The only other reported District Court case holding terminable consumer leases to be "credit sales" within the meaning of the Truth-In-Lending Act is *Davis v. Colonial Securities Corp.*, 541 F. Supp. 302 (1982). In an opinion remarkable only for its misstatement of the law, the District Court for the Eastern District of Penn-

sylvania declined to follow the conclusion of the FRB Staff Opinion Letters, on the theory that "unofficial opinions of the Federal Reserve Board are not necessarily binding upon the Courts." *Id.* at 305. In this respect, *Davis* represents a rather disturbing departure from the Supreme Court's holding in *Milhollin* that Federal Reserve Board Staff Opinions are entitled to substantial deference. The *Davis* Court has made a distinction between official and unofficial opinions of the Federal Reserve Board; this is a distinction which the Supreme Court did not make in *Milhollin*. In addition to the apparent disregard of *Milhollin* by the Eighth Circuit, the *Davis* case appears to represent the beginning of an erosion of this Court's holding in *Milhollin* by the District Courts in the form of this purely semantic and totally nonsubstantive distinction. However, even if we were to give the *Davis* Court's[2] distinction full validity, that Court still chose to ignore the most official statement that the Board can make in the form of the revision of Regulation Z, which, at the time *Davis* was decided, specifically excluded terminable consumer leases from the definition of "credit sale." 12 C.F.R. § 226.2(16). If the *Davis* Court was indeed looking for an official Board statement with regard to the definition of "credit sale," it apparently "did not see the forest for the trees."

Although *Davis* was not relied upon by the Eighth Circuit below, the Petitioner wishes to make the Supreme

---

[2] The *Davis* Court went on to say that "the Board's position narrowly defines the term 'credit sale' and does not recognize that the act should be construed liberally. . . ." *Id.* at 305. What the *Davis* Court did not recognize is that, however the Act is to be construed, it is to be construed in the first instance by the Federal Reserve Board and its staff.

Court aware of what appears to be a growing tendency among the courts to disregard the Federal Reserve Board and its interpretations of the TILA. By distinguishing between official and unofficial opinions of the FRB, the *Davis* Court is essentially "splitting hairs"; this is the same sort of judicial disrespect for the Federal Reserve Board of which the Ninth Circuit was found guilty in *Milhollin*, and this Court should put a stop to such efforts to undermine *Milhollin*.

Another objectionable feature of the Eighth Circuit's opinion below was its treatment of the contractual relationship between the parties. Unimpressed by the distinct characteristics of a terminable consumer lease, the Court of Appeals refused to hold as a matter of law that such leases were not "credit sales" within the meaning of the Truth-In-Lending Act. 685 F.2d at 248. Instead, the Court of Appeals decided that a trial court should hear evidence concerning the "totality of the circumstances surrounding [the] transactions" and the parties' "contractual expectations." *Id.* at 248. Thus the court imagined that there might be some set of facts which would magically change a terminable consumer lease into a credit sale despite the unambiguous wording of the parties' rights in the agreement.

While the Court of Appeals has authority to interpret contracts in some cases, it does not have the authority to rewrite them. And where, as here, the contract is clear and unambiguous in its terms, the court may not inquire into the subjective expectations of the parties. A terminable consumer lease, such as the one entered into by the Respondent in this case, is a legitimate business method of making available to consumers the use and servicing of consumer products. The fact that such transactions fall outside of the scope of the Truth-

In-Lending Act does not give the Court of Appeals the right to rewrite both the contract and the Truth-In-Lending Act.

The Federal Reserve Board has repeatedly held that terminable consumer leases are not subject to the disclosure requirements of the TILA. On its face, the contract clearly and unamibguously gives the renter the unilateral right to terminate this contract at any time without further obligation and without penalty. Therefore, as a matter of law, the Truth-In-Lending Act has no application to this transaction and the Eighth Circuit erred in holding otherwise.

In summary, the decision of the Eighth Circuit Court of Appeals below goes against the overwhelming authority on the issue presented in this case, is in irreconcilable conflict with the decisions of the Federal Reserve Board and its interpretation of the Truth-In-Lending Act, and totally disregards this Court's holding in *Ford Motor Credit Company v. Milhollin, supra.* The court below has attempted to usurp Congressional authority by ignoring the opinion of the administrative body charged by Congress with the responsibilty of interpreting the act and, instead, the Court has tried to legislate on its own. This has all been done in the face of this Court's explicit direction to the contrary. If the Eighth Circuit's opinion below is not reviewed, the precedential value of *Milhollin* is seriously damaged.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

J. SAMUEL CHOATE, JR.
505 First National Bank Building
801 Broad Street
Augusta, Georgia 30903
(404) 722-3301

Attorney for Petitioner
and Counsel of Record

December, 1982